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Supreme Court, U.S.
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No. 03-116

IN THE

SUPREME COURT OF THE UNITED STATES

DENNIS COCHRAN, Individually and in his Capacity as the Chief of Police of the City of Edmond, Oklahoma,

Petitioner,

v.

TIMOTHY RAY BARNTHOUSE, ANCEL SCOTT FEES, and JAMES DALLAS TELL, III,

Respondents.

On Petition For Writ of Certiorari to the Supreme Court of Oklahoma

PETITIONER'S REPLY BRIEF

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For his reply to Respondent's Brief in Opposition to the petition for writ of certiorari in this case, Petitioner Dennis Cochran submits the following:

PROPOSITION I:

RESPONDENTS' EMPHASIS ON THE "CLEARLY ESTABLISHED" NATURE OF RIGHTS PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT DIVERTS FROM THE ACTUAL ISSUE OF A MUNICIPAL DECISION MAKERS' GRUDGING ACQUIESCENCE TO AN ARBITRATION DECISION ENTERED PURSUANT TO THE TERMS OF THAT AGREEMENT. ONLY THE LATTER COMES BEFORE THIS COURT FOR REVIEW.

Both the Oklahoma Supreme Court and the Respondents hammer away at the immunity right of Dennis Cochran by drawing attention to the Tenth Circuit's opinions in *Dill v. City of Edmond*, 155 F.3d 1193 (1998) and *Hennigh v. City of Shawnee*, 155 F.3d 1249 (1998). They accurately portray these cases as supporting the proposition that clearly established law allows property interests to spring from Collective Bargaining Agreements. Neither Dennis Cochran nor the City of Edmond have ever disputed this now fundamental legal principle. That, however, is not what brings Dennis Cochran before this Court.

Chief Cochran contends that, until so advised by the majority of the Oklahoma Supreme Court, he had no way of knowing that the property right claimed by Respondents had vested by operation of clearly established law during the pendency of a challenge to the validity of the promotion process - a challenge whose legal genesis also arose out of the Collective Bargaining Agreement. If a grievant could not effect the outcome of a promotion process he claimed tainted, then the grievance process under the Collective Bargaining Agreement become empty words and promises incapable of being kept or enforced. If, on the other hand, the grievance process had real teeth, then the results of the tainted process could not establish vested rights.

The arguments and depositions before the court below establish that Dennis Cochran occupied the role of totally

dispassionate observer of the grievance process which culminated in the vacation of the promotion examination results by which Respondents occupied their respective offices as sergeants with the Edmond Police Department. He not only maintained all along that the right persons were promoted; he actually bucked the union and stood up for the right of the Respondents to occupy their posts during the pendency of the grievance. Left up to him, these men would never have left that position. Bound by law, and the arbitrators' ruling, however, he bowed to the inevitable.

Stated simply, the "general rule applied by both this Court and the Tenth is that a qualified immunity defense succeeds unless a plaintiff alleges that defendant violated that plaintiff's clearly established rights." *Roska v. Peterson*, 304 F.3d 982, 1000 (10th Cir. 2002). In practice, this means that whether a governmental official performing discretionary functions is entitled to qualified immunity turns on the "objective legal reasonableness" of the official's actions in light of the clearly established law at the time the actions were taken. *Wilson v. Layne*, 526 U.S. 603, 614 (1999).

This Court, in *Hope v. Pelzer*, 122 S.Ct. 2508, 2515 (2002), recently described "clearly established law" as follows:

> As we have explained, qualified immunity operates "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier v. Katz*, 533 U.S. at 206. . . . For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see *Mitchell* [*v. Forsyth*, 472 U.S. 511,] 535, n. 12 . . .; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S.

635, 640 . . . (1987).

Chief Cochran does not quote this Court's own opinions idly or in the belief that it needs reminders as to the contours of the qualified immunity defense which this Court itself established and continues to embrace. Rather, he does so to point out that the circumstances of this case highlight the need, in light of the foundation which this Court has laid, to grant certiorari in order to draw that embrace more protectively and securely around its jurisprudential offspring lest it become lost in a crowded field in which each State may place its own limiting or expansive mark upon the defense.

The precedents of this Court, and of the various circuits and districts, establish that qualified immunity is the norm. "[The plaintiff's] burden is not easily discharged: `That qualified immunity protects government actors is the usual rule; only in exceptional cases will government actors have no shield against claims made against them in their individual capacities.'" *Foy v. Holston*, 94 F.3d 1528, 1532 (11th Cir. 1996).

Therefore, even assuming Respondents' case as developed thus far sufficient to state a Constitutional violation, the next question in the qualified immunity inquiry is "whether it would [have been] clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 201-02. Qualified immunity turns on whether an officer could, or could not, have held an objectively reasonable belief in the legality of the challenged conduct. See, e.g., *Wilson*, 526 U.S. at 614: "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the `objective legal reasonableness' of the action, assessed in light of the legal rules that were `clearly established' at the time it was taken." (Citations omitted.) "Stated another way, qualified immunity shields a defendant from suit if he or she could have reasonably believed his or her conduct to be lawful `in light of clearly established law and the information [that the defendant] possessed. . . . The qualified immunity standard "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law."'" *Smithson v. Aldrich*, 235 F.3d 1058, 1061 (8th Cir.

2000). See also *Figg v. Schroeder*, 312 F.3d 625, 636 (4th Cir. 2002): "Under the doctrine of qualified immunity, `officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines.'" (Citation omitted.)

At this point in their analysis, the reasoning of the majority of the Oklahoma Supreme Court and the Respondents breaks down in light of the way this Court has guided the evolution of qualified immunity to date. A defendant always enjoys the benefit of a presumption in favor of his good faith immunity. Allowing a generically accurate statement of the law ("collective bargaining agreements as sources of property interests") to overshadow the circumstantial and objective reasonableness of an official's action at the time the challenged action occurred becomes hazardous to the rule. As held in *Anderson:*

> The operation of this [clearly identified] standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.

483 U.S. at 639. See also *Bills v. Aseltine*, 52 F.3d 596 (6th Cir. 1995) ("As with the example of the Due Process Clause cited in *Anderson*, 483 U.S. at 640, 107 S.Ct. at 3039, the

fact that the Fourth Amendment embodies "well-established" principles will not defeat a claim of qualified immunity. Otherwise, the doctrine is rendered a mere rule of pleading.")

In addition to defending the vitality of *Anderson* and its progeny, the grant of certiorari in this case would further two other important federal interests:

First, to allow evaluation of qualified immunity in the manner urged by Respondents and applied by the majority of the Oklahoma Supreme Court gives primacy to a rule based on hindsight - a basis upon which subjective exceptions might eviscerate the rule. Even if, in hindsight, the conduct of Chief Cochran violated the Fourteenth Amendment, Respondents' rights in this context were certainly not clearly established by precedent or by a generally applicable principle whose *specific application* to this controversy was *clearly foreshadowed* by direct authority. Never before has this Court, the Oklahoma Supreme Court, or the Tenth Circuit attempted to determine the status of a right as vested under a Collective Bargaining Agreement while under challenge instituted under the grievance provisions of that same Agreement. Never has the potential conflict found harmonizing interpretation in any jurisdiction in which Chief Cochran served. The right must be stated with sufficient particularity so that a "`reasonable officer would understand that what he is doing violates that right'" and the right must have been "clearly established at the time of the defendants' alleged improper actions, and . . . not . . . through the use of hindsight." *Souza v. Pina*, 53 F.3d 423, 425 (1st Cir. 1995) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). A court cannot extract a clearly established right from a somewhat confusing body of caselaw through the use of hindsight, or "permit claims of qualified immunity to turn on the eventual outcome of a hitherto problematic constitutional analysis." *Martinez-Rodriguez v. Colon-Pizarro*, 54 F.3d 980, 989 (1st Cir. 1995).

Chief Cochran can, by no means, be cast in the role of malefactor in this case. As noted, he championed these Respondents' rights to remain in their post during the pendency of the grievance and consistently maintained they were the right men for the post. However, as the hapless

decision maker he found ultimately found himself between a rock and a hard place. Regardless of whether he decided to defy the arbitration award or comply, some faction within the department or union would rise against it. This situation was unique in his experience. While personally favorably disposed to Respondents, he did not need to engage in futile litigation prior to abiding by the Collective Bargaining Agreement and honoring the arbitration. In doing so he erred, if at all, on the side of orderly process and settled expectations as to the binding nature of the arbitrations mandated by the Collective Bargaining Agreement. As the occupant of a position symbolizing both the primacy of law and the necessity of order, it constituted a rational choice. Under the contours of qualified immunity established by this Court and impressed upon the opinions of other federal tribunals, no court may second-guess him into exposure to personal liability. In defense of this essential tenet of federal jurisprudence, this Court should grant certiorari to rectify the erroneous result and ruling of the Oklahoma Supreme Court.

As a second point, nothing in the opinion of the Oklahoma Supreme Court establishes that it ever considered the "clearly established" issue from the perspective of Chief Cochran as a police chief experienced in the administration of law enforcement but untrained in the subtleties of law. To charge the ordinarily prudent police officer with the ability and/or obligation to engage in a prospective and lawyer-like analysis of a Collective Bargaining Agreement, together with satellite issues of Constitutional and property law, and to impose upon him the duty to determine the potential construction and application of potentially conflicting portions of that agreement (a prerequisite to the "clearly established" and "objectively reasonable" analysis) is unrealistic and, indeed, inappropriate. In *Saucier*, this Court stated explicitly that "[t]his inquiry ["clearly established], it is *vital* to note, must be undertaken in light of the specific context of the case, not as a broad general proposition." Thus courts must consider the context from the defendant's perspective.

In sum, neither Respondent nor the Oklahoma Supreme Court reconcile the latter's decision with this

Court's repeated recognition that qualified immunity cannot be denied merely because the conduct is later held to be unlawful. Quite the contrary , this Court has explained, immunity may be denied only "if, on an objective basis, it is obvious that no reasonably competent officer would have concluded" that the conduct was lawful at the time the defendant acted. *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (emphasis added). See also ibid. ("if officers of reasonable competence could disagree on" the lawfulness of the conduct, "immunity should be recognized"); *Wilson v. Layne*, 526 U.S. at 614-615 ("'[C]learly established' for purposes of qualified immunity means that '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'") (quoting *Anderson* , 483 U.S. at 639-640); *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (qualified immunity "'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" (quoting *Malley*, 475 U.S. at 343, 341)).

A court addressing a qualified immunity claim on summary judgment must, for purposes of the motion, resolve all material factual disputes in favor of the plaintiff and "look[] to the evidence before it (in the light most favorable to the plaintiff)." *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996). The court then must ask whether, under those circumstances, any reasonable officer could have thought the conduct in question lawful. If the answer is "yes," immunity must be granted. See *Malley*, 475 U.S. at 341 ("if officers of reasonable competence could disagree on" the lawfulness of the conduct, "immunity should be recognized"). If instead, "on an objective basis, it is obvious that no reasonably competent officer would have concluded" that the conduct was lawful, immunity should be denied. *Id.*

Respondents' arguments notwithstanding, grant of certiorari in this case would serve several important federal goals:

1. It would prevent lower courts from elevating generic legal truisms to the level of "clearly established law" in the unique context of specific cases;

2. It would restore circumstantial and temporal objectivity to the qualified immunity analysis;

3. It would prevent the nullification of qualified immunity by state-wrought exceptions likely to .swallow the rule.

Therefore, Chief Cochran renews his request that this Court grant his Petition.

PROPOSITION II:

RESPONDENTS MISCAST AND MISCONSTRUE THE SIGNIFICANCE OF *NEAL*

Respondents call this Court's attention to Oklahoma court rules which prohibit citation to unpublished appellate opinions. Respondents also point out that the decision to re-test them in the wake of the arbitrator's decision predates the appellate disposition of the Adrian Neal case. In this manner, they seek to dilute Chief Cochran's (and indeed the City of Edmond's) experience with the arbitration process leading them to bow to the inevitability of enforcement of the arbitration award. In fact, they miss the point of the *Neal* reference.

Chief Cochran neither cites *Neal* as legal authority for any proposition raised in his Petition for Certiorari nor does he submit it to persuade this Court that his action in abiding by the arbitration opinion in the manner he did has received the sanction of "clearly established law." As exhaustively discussed in the preceding proposition the Oklahoma Supreme Court wrote the opinion at issue here upon a true *tabula raza* in terms of the situation confronting Chief Cochran. The whole point of his position as to qualified immunity is that *no clearly established law existed.* Chief Cochran's experience with Adrian Neal does not provide the genesis of his fatalism regarding judicial challenge to the arbitration decision despite his personal belief that the arbitrators erred. Rather, *Neal* represented a symptom of the legal double-bind in which the law placed Chief Cochran and any reasonable, similarly situated official.

Neal, like the whole of Oklahoma's public arbitration jurisprudence, constitutes not precedent but a basis for belief. The determination of whether a federal law "was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of

`legal facts.'" *Elder v. Holloway*, 510 U.S. 510, 516 (1994); *Medina v. Cram*, 252 F.3d 1124, 1127-28 (10th Cir. 2001). A court engaging in review of a qualified immunity judgment should therefore use its "full knowledge of its own [and other relevant] precedents." *Elder, supra.* If this be true for a court in order to assess the objective reasonableness and the lawfulness of an action in hindsight, should not the same standard apply to non-prescient lay public officials? A reviewing court has the benefit of *stare decisis* to assist it. For the layman, *stare decisis* equates with experience. Lay experience does not differentiate between mandatory and persuasive authority. It does not distinguish published from unpublished decisions. The layman merely knows what has happened to him in much the same fashion as root source of experience provides truth to the accuracy of the platitude "once burned; twice cautious."

In Oklahoma, the fundamental purpose of arbitration is to preclude court intervention into the merits of a dispute when arbitration has been provided for contractually. *Voss v. City of Oklahoma City,* 1980 OK 148, 618 P.2d 925, 927. The scope of judicial review of an arbitrator's decision was reiterated in *City of Yukon v. Int'l Assn of Firefighters, Local 2055*, 1990 OK 48, 792 P.2d 1176:"'as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' this Court has no power to reverse his decision, even if we were convinced the decision was error." (quoting *United Paperworkers Int'l v. Misco*, 484 U.S. 29, 37 (1987)). This judicial philosophy constitutes the legal Pole Star by which those involved with public arbitration take their bearings.

To tighten the bind in which the law places someone in Chief Cochran's position, if the view of the Oklahoma Supreme Court in this case becomes the norm, we have the concept of presumed legal knowledge. As recently stated by the Oklahoma Supreme Court: "persons dealing with public officials are charged with notice of limitations upon the powers of the official." *State ex rel State Insurance Fund v. JOA, Inc.*, 2003 OK 82, 22, __ P.3d __. Secondly, "[i]t is well established in Oklahoma that every person is presumed to know the law." *Hefley v. Hefley*,1995 OK CIV APP 143, 14, 915 P.2d 389. These principles which apply to all persons in

Oklahoma, and which may apply more strongly in the case of a public official, create the box in which extant local law constructed in regard to his expectation of futility in resisting the arbitrator's order. His personal experience in having his efforts to resist summarily rebuffed in *Neal* drove in the final nail.

In *Elder*, this Court stated that "The central purpose of affording public officials qualified immunity from suit is to protect them 'from undue interference with their duties and from potentially disabling threats of liability.' *Harlow v. Fitzgerald,* 457 U.S., at 806." 510 U.S. at 515. Just as the Ninth Circuit decision scrutinized in *Elder*, the Oklahoma Supreme Court's qualified immunity analysis "does not aid this objective because its operation is unpredictable in advance of the district court's adjudication. Nor does the rule further the interests on the other side of the balance: deterring public officials' unlawful actions and compensating victims of such conduct." *Id.* at 516. In fact, the differing opinions of the trial judge and the dissenting justices below point out once more how unfair imposing liability on an after-fashioned rule of law becomes. It also points out how destructive such adjudications may become to the qualified immunity rule so carefully crafted by this Court to date. It can only serve to encourage the litigious to take their chances in filing actions against the public officials the qualified immunity rule came into being to spare.

CONCLUSION

For these reasons, and those set out in the original Petition, this Court should grant Chief Cochran's writ.

Respectfully submitted,

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